

Estimated Hearing Date: October 30, 2019 at 9:30a.m. (AST)

Objection Deadline: October 16, 2019 at 10:00a.m. (AST)

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

In re:	) PROMESA
THE FINANCIAL OVERSIGHT AND MANAGEMENT	) Title III
BOARD FOR PUERTO RICO,	)
	) No. 17 BK 3283-LTS
as representative of	)
THE COMMONWEALTH OF PUERTO RICO,	) (Jointly Administered)
<i>et al.</i>	)
	)
Debtors.	)
	)
	)
In re:	) PROMESA
	) Title III
THE FINANCIAL OVERSIGHT AND MANAGEMENT	)
BOARD FOR PUERTO RICO,	) No. 17 BK 4780-LTS
	)
as representative of	)
PUERTO RICO ELECTRIC POWER	)
AUTHORITY ("PREPA")	)
	)
Debtor. <sup>1</sup>	)
	)

**COBRA ACQUISITIONS LLC'S  
OPPOSITION TO THE JOINT URGENT MOTION OF THE OVERSIGHT BOARD,  
PREPA, AND AAFAF TO EXTEND ALL APPLICABLE DEADLINES TO COBRA  
ACQUISITIONS LLC'S MOTION FOR ALLOWANCE AND PAYMENT OF  
ADMINISTRATIVE EXPENSE CLAIMS**

<sup>1</sup> The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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To the Honorable United States District Judge Laura Taylor Swain:

Cobra Acquisitions LLC (“Cobra”), by and through counsel, hereby files this Opposition to the Joint Urgent Motion of the Oversight Board, PREPA, and AAFAF to Extend All Applicable Deadlines to Cobra Acquisition LLC’s Motion for Allowance and Payment of Administrative Expense Claims (the “Opposition”) requesting that the Court deny the Puerto Rico Electric Power Authority (“PREPA”), the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”), and the Puerto Rico Fiscal Agency and Financial Advisory Authority’s (“AAFAF,” collectively the “Movants”) motion for a stay of litigation (the “Urgent Motion”) relating to Cobra Acquisitions LLC’s Motion for Allowance and Payment of Administrative Expense Claim [Case No. 17-BK-3283-LTS, ECF No. 8789] (the “Administrative Expense Motion”). In support of its Opposition, Cobra respectfully states as follows:

### **PRELIMINARY STATEMENT**

1. The Movants’ purported “urgent” motion does not assert any valid exigency that would require this Court to delay Cobra’s rights to collect amounts that are due, owing, and in large part undisputed by Movants. Instead, the motion is little more than a set of newly concocted red-herring arguments that are irrelevant to the fact that Cobra performed vital services to the Movants under a valid and existing contract and is entitled to payment for those services

2. Cobra opposes the Movants’ request for a stay of Cobra’s \$216 million in claims under the October 19, 2017 Emergency Master Service Agreement for PREPA’s Electrical Grid Repairs – Hurricane Maria (the “First Contract”) and the May 26, 2018 Master Service Contract for PREPA’s Electrical Grid Repairs Hurricane Maria (the “Second Contract” and together with the First Contract, the “Contracts”) between Cobra and PREPA, including claims that PREPA has

never disputed. The Movants do not dispute that Cobra successfully rebuilt Puerto Rico's electrical system at tremendous effort and expense in accordance with its Contracts with PREPA. Nor do they disagree that PREPA has never disputed Cobra's right to be paid for the work it did and that some of Cobra's claims seek payments of amounts that PREPA has never questioned, including \$61,668,083.34 in tax reimbursements owed under the First Contract. Additionally, accruing interest is increasing Cobra's claims by approximately \$2.5 million per month.

3. Instead, the Movants have invented a new reason to delay the day PREPA must pay Cobra for its work. Movants now contend that Cobra's claims must be stayed because of an indictment dated September 3, 2019 against three individuals who are not parties to this case and a July 3, 2019 report issued by the Office of the Inspector General of the Department of Homeland Security ("OIG Report") about the process the Federal Emergency Management Agency ("FEMA") used in approving the rates PREPA agreed to pay Cobra. *See U.S.A. v. Tribble*, Case No. 19-CR-541-FAB, ECF No. 3 (D.P.R. Sep. 3, 2019) (the "Indictment"), "FEMA's Eligibility Determination of Puerto Rico Electric Power Authority's Contract with Cobra Acquisitions LLC" (OIG-19-52) ("OIG Report"). Neither the Indictment nor the OIG Report are grounds upon which to stop all progress on Cobra's claims, the prompt payment of which are crucial to the Company. Neither the Indictment nor the OIG Report calls into question Cobra's entitlement to be paid for the work it did pursuant to the Contracts awarded by PREPA and reviewed by FOMB, the Central Office of Recovery, Reconstruction, and Resilience ("COR3"), the Office of Contracts and Procurement Compliance ("OCPC"), and FEMA. There is no reason Cobra's claims should languish while the criminal matters proceed and therefore the Movants' request for a stay should be denied.

4. In particular, rather than stay Cobra's claims, Cobra requests that the Court hear Cobra's undisputed claims, totaling \$89,357,178.29, for which no discovery is necessary, at either the October 30, 2019 or December 11, 2019 omnibus hearings. For the disputed claims, Cobra requests that the Court address them at either the October 30 or December 11 hearing to determine whether and to what extent discovery is necessary, the timing of any discovery for the disputed claims, and then hear those claims at the January 29, 2020 omnibus hearing. In any event, a stay of the proceedings is entirely unwarranted.

### **BACKGROUND**

5. Movants say that Cobra "supposedly" expended enormous effort and expense under extremely difficult circumstances to assist in rebuilding Puerto Rico's electrical system. Urgent Motion at 2. This blithe dismissal of Cobra's efforts could only have been written by a lawyer sitting in the safety and comfort of an office on the mainland. The simple truth is that, but for Cobra's restoration work, PREPA would have no free cash flow and no reorganization would be on the horizon. Movants' insulting position is undermined by statements by FEMA and the government of Puerto Rico. Both FEMA, in a December 23, 2017 letter to the Governor of Puerto Rico, and the Governor of Puerto Rico, in a July 9, 2018 report, recognized the enormity of the devastation of the island following Hurricane Maria and the importance of repairing the electrical grid, work undertaken and completed by Cobra. *See* OIG Report at 1-3, Letter from U.S. Department of Homeland Security Region II to José I. Marrero, Esq., CPA, Governor's Authorized Representative, Government of Puerto Rico, *FEMA-4339-DR-PR Puerto Rico Electric Power Authority – Emergency Power Restoration Review of Contract and Funding for Cobra Energy* (Dec. 23, 2017) ("December 23, 2017 Letter"). FEMA also recognized that Cobra had been waiting for months to be paid close to \$200 million dollars for work performed. *See*

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December 23, 2017 Letter. Even today, Cobra is owed approximately \$250 million, much of which is for the recovery of out of pocket expenses.

6. These amounts were due and owing (and in some instances undisputed by PREPA) long before Movants concocted the arguments set forth in their “urgent” motion. Before now, PREPA has never contended that its failure to pay Cobra has anything to do with the well-known criminal investigation that led to the Indictment or the FEMA cost analysis that led to the OIG Report. To the contrary, PREPA has long acknowledged that Cobra must be paid for the crucial work it performed, but has cited various other issues for its lengthy delay in actually issuing the required payments.

7. In accordance with the terms of the Contracts, Cobra has submitted timely invoices and continually sought payment. PREPA has not disputed the services rendered, but for the last six months continually sought to delay payment for reasons unrelated to their new arguments. The Movants now seek to further delay Cobra’s recovery of almost one quarter of a billion dollars, citing for the first time the Indictment and the OIG Report.

8. Critically, the Indictment does not charge Cobra. The Indictment was issued on September 3, 2019 by the U.S. Attorney’s Office for the District of Puerto Rico. The Indictment states fifteen criminal charges against Ahsha Tribble, former FEMA Region II Deputy Regional Administrator and Sector Lead for Power and Infrastructure in Puerto Rico, Keith Ellison, a former President of Cobra who was terminated from his employment by Cobra well before the issuance of the Indictment, and Jovanda Patterson, former FEMA Deputy Chief of Staff assigned to San Juan, Puerto Rico.

9. The Indictment alleges that Tribble accepted things of value from Ellison in return for performance of official acts as a FEMA employee. The Indictment asserts ten charges against

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Tribble for conspiracy to commit bribery, honest services wire fraud, disaster fraud, and violation of the Travel Act. The Indictment asserts eight charges against Ellison for conspiracy to commit bribery, honest services wire fraud, disaster fraud, and making false statements. The Indictment contains two charges against Patterson for wire fraud and committing acts affecting personal conflicts of interest.

10. The OIG Report that Movants rely upon was issued on July 3, 2019. The OIG Report did not find that the rates were unreasonable or ineligible for reimbursement nor did the OIG Report find any wrong-doing on the part of Cobra, but instead recommended that FEMA perform further analysis, which is to be completed by May 2020. FEMA's further analysis will not have any legal effect on Cobra's entitlement to payment under the Contracts, which are with PREPA, not FEMA, and are not dependent upon PREPA's receipt of funding from FEMA.

## **ARGUMENT**

### **I. Legal Standard**

11. "The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." *Keating v. Office of Thrift Supervision*, 45 F.2d 322 (9th Cir. 1995) (citing *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1997), *cert. denied*, 449 U.S. 993, 66 L. Ed. 2d 289, 101 S. Ct. 529 (1980)). It is within courts' discretion to stay civil proceedings "when the interests of justice seem to require such action." *Dresser Indus.*, 628 F.2d at 1375. However, it would become a "constant source of delay and an interference with judicial administration" to issue stays solely because a litigant is defending simultaneous lawsuits. *Paine, Webber, Jackson & Curtis Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980). A stay of pending civil action until the outcome of related



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criminal proceedings is considered to be an “extraordinary remedy.” *Weil v. Markowitz*, 829 F.2d 166, 174 (D.C. Cir. 1987).

## **II. No Stay Is Warranted**

### **a. Approval of Funding by FEMA is not Grounds for Withholding Payments Under the Contracts and Does Not Warrant a Stay**

12. The Movants rely heavily on the notion that FEMA funding pays for the costs of power repairs and restoration as an additional pretext for delay. These arguments, however, ignore the incontestable fact that Cobra’s contracts are with PREPA, not FEMA. Under the Contracts, PREPA is required to pay Cobra for its work regardless of whether FEMA is obligated to reimburse PREPA. Article 29 of the First Contract provides, “The Contractor acknowledges that starting on October 25, 2017, FEMA financial assistance will be used to fund this Contract...Any failure to secure approvals or funding from FEMA or some other source (except due to the Contractor’s sole fault) shall not relieve PREPA from its obligations for payment under this Contract.” Article 53(F) of the Second Contract provides “The Contractor acknowledges that Federal assistance awarded by U.S. federal agencies will be used, in part, to fund this Contract. However, any failure of PREPA to secure this funding (except due to the Contractor’s sole fault), shall not relieve PREPA from its obligations of payment under this Contract.”

13. The Indictment’s allegations of wrongdoing by FEMA officials are irrelevant to whether PREPA must pay Cobra for the work Cobra performed, and the resolution of those allegations in the criminal proceedings will have no effect on the validity of Cobra’s administrative claims for payment from PREPA. Likewise, to the extent there are any factual issues raised by Cobra’s administrative claims, they clearly do not include issues about the

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conduct of FEMA officials or interactions between Cobra employees and FEMA and there is no reason for any discovery relating to Cobra's claims to touch upon any such issues.

**b. The Indictment of Non-Parties Is not Grounds for Withholding Payments Under the Contracts and Does Not Warrant a Stay**

14. The Court should reject the Movants' request that the Court halt all progress on Cobra's administrative expense claims pending the criminal trial of Ahsha Tribble, Jovanda Patterson, and Keith Ellison.

15. The Movants mischaracterize the Indictment and the impact it could have on PREPA's obligations under the Contracts with Cobra. The Movants repeatedly suggest that the Indictment charges Cobra with misconduct, when it clearly does not. To the contrary, the Indictment contains no charges against Cobra at all.

16. The Indictment also does not "call[] deeply into question" "the propriety of Cobra's contracts with PREPA" or "any claims Cobra may have based on those contracts." Urgent Motion at 3, ¶ 4. The Indictment is of three individuals, none of whom is a party to the Contracts at issue. The Indictment does not accuse Cobra of any wrongdoing, nor does it allege that any PREPA officials took any bribes or otherwise acted corruptly in connection with the Contracts. Indeed, the Indictment does not make any allegation at all to suggest that Cobra's Contracts with PREPA were awarded improperly or corruptly. Nor does it suggest in any way that Cobra did not fully earn the right to be paid for the work it indisputably performed at PREPA's direction to restore power to the island of Puerto Rico after the electrical grid was demolished.

17. In particular, Movants wrongly suggest that the Indictment alleges conduct that, if proven, would allow PREPA to accept Cobra's work without paying for it under the contracts. Contrary to Movants' contention, convictions under the Indictment would not result in rescission

under either Article 69 of the First Contract or Article 49 of the Second Contract. Article 69 of the First Contract provides for rescission only if the contractor (i.e., Cobra) is convicted of or pleads to any of the crimes enumerated in Article 3 of Public Law 458. Cobra, of course, has not been charged, much less convicted, of any such crime. Article 49 of the Second Contract does not provide for rescission.

18. Movants' citation to various provisions of the Contracts that permit PREPA to "terminate" the Contracts in the event of wrongdoing by Cobra executives or employees are of no help to Movants. Both Contracts are clear that, upon termination, "PREPA shall pay to the Contractor all portions of the work completed and for actual, reasonable, and necessary expenses caused by such termination, which shall apply in the case of Termination by either Party for any reason." First Contract, Article 14; Second Contract, Article 14. Thus, PREPA is contractually required to pay Cobra on its administrative claims even if all of the Indictment's allegations are proved true.

19. Also demonstrably wrong is Movants' assertion that allowing Cobra's administrative claim "potentially would result in Cobra being awarded an administrative expense claim for contracts that it fraudulently induced PREPA to enter". Urgent Motion at 11, ¶ 28. Equally baseless is the Movants' suggestion that the Indictment raises the specter that Cobra's Contracts may be "voidable" for having been obtained by "deceit." Urgent Motion at 12 n. 8. The Indictment does not allege that the Contracts were obtained by fraud, deceit or other improper action. Nor does it allege any facts that would give rise to a contention that Cobra or PREPA were "implicated in an 'illicit' consideration for a contract." Urgent Motion at 12 n. 8. To the contrary, the Indictment makes no allegations at all that undermine the legitimacy of the

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Contracts awarded by PREPA, much less the quality of the work Cobra performed under the Contracts and its entitlement to be paid for that work.

**i. The Indictment of Non-Parties Does Not Justify the Delay of Discovery**

20. PREPA cites *Trustees of the Plumbers & Pipefitters National Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134 (S.D.N.Y. 1995), to support its argument that a stay should be entered in the instant proceedings because the ongoing criminal proceedings could impede on parties' Fifth Amendment rights and to avoid duplicative discovery efforts. Urgent Motion at 11, n. 6. In *Trustees*, defendants in a civil matter were indicted for conduct identical to that at issue in the civil matter. *Trustees*, 886 F. Supp. at 1139. The court found that the significant overlap of the issues in the civil and criminal proceedings weighed in favor of a stay. *Id.*

21. The *Trustees* case is easily distinguishable from the instant matter. The government has not charged Cobra with any crimes. Unlike in *Trustees*, the defendants in the civil matter are not the same as the defendants in the criminal matter. Moreover, the conduct that is the subject of the criminal matter is not identical to the conduct in the civil matter. Cobra's civil claims are that PREPA entered into post-petition contracts with Cobra, Cobra performed those contracts by restoring electrical power to Puerto Rico, and PREPA has failed to pay Cobra for its services. These claims are far from the conduct alleged in the criminal proceeding, which involves only actions taken by three individuals, none of which affects the legitimacy of the Contracts between Cobra and PREPA.

22. The Movants further argue that a stay is necessary because discovery in the criminal proceedings and the instant matter will have significant overlap and "would be materially impeded while the criminal cases are pending." Urgent Motion at 5. The Movants

argue that discovery will be rendered “more difficult if witnesses feel it necessary to invoke Fifth Amendment privileges while the criminal proceeding remains ongoing.” Urgent Motion at 11. But the possibility that a witness might invoke the Fifth Amendment is present in any case. The only witnesses who could be expected to do so here are the three indicted individuals, none of whom Cobra relies on for its administrative expense claims and none of whom Movants show have any testimony relevant to those claims.

23. Notably, the United States has not indicated that it shares the Movants’ view that adjudicating Cobra’s claims for payment should await the criminal proceedings against the three individuals. The federal prosecutors are well aware of this civil action, as Cobra informed the assigned Assistant United States Attorney of its intent to file its administrative expense claims in this Court. And shortly after filing the administrative expense motion, Cobra provided a courtesy copy of the filing to the prosecutor.

**ii. The Indictments Do Not Support Movants’ Arguments**

24. Ahsha Tribble is an employee of FEMA, not PREPA. The Contracts under which Cobra seeks payment are between PREPA and Cobra. Even if Tribble were found guilty of any of the charged crimes, it would not affect the validity of the Contracts between Cobra and PREPA. *See* Ind. ¶ 39.

25. The charges against Jovanda Patterson are independent of the charges against Tribble and Ellison. Patterson is alleged to have defrauded Cobra by misrepresenting her salary at FEMA to Cobra. Thus, Cobra is the victim of Patterson’s alleged crime. According to the Indictment, because of this misrepresentation, Cobra suffered close to \$200,000 in damages. Accordingly, the charges against Tribble and Patterson do not affect this Court’s ability to hear Cobra’s claims for administrative expenses.

26. The charges against Ellison also do not call into question Cobra's contracts or claims. The conduct alleged in the Indictment did not begin until after the First Contract was awarded to Cobra. The alleged misconduct began no earlier than February 2018, the first time Ellison is alleged to have provided something of value to Tribble. *See* Ind.¶ 42. The Indictment alleges that in February 2018, Ellison provided Tribble with a helicopter tour of Puerto Rico and a contact to provide her with a place to stay in New York. *Id.* at ¶¶ 42, 56. This was not only well after the First Contract had been executed but after the execution of the first four amendments to that contract. Neither of these incidents bears upon the validity of the fifth amendment to the First Contract nor the execution of the Second Contract.

27. In fact, most of the alleged things of value provided to Tribble are asserted to have been provided in July 2018. The Indictment alleges that Ellison provided Tribble with hotel accommodations and airfare in July 2018, September 2018, and November 2018. The Second Contract preceded all of this alleged conduct by several months.

28. The Indictment also contains no allegations that Cobra failed to fully perform the Contracts, was overpaid or did not earn all of the sums it seeks in its administrative expense claims. To the contrary, Cobra successfully restored power to Puerto Rico, thus providing an immense benefit to PREPA and the people of Puerto Rico. The Indictment makes no allegations that bring into question any of the pricing of Cobra's services under the Contracts. PREPA, COR3, OCPC, and FEMA all reviewed the costs and rates included in the Contracts and the Indictment does not allege that any of the charged conduct resulted in costs or rates higher than Cobra deserved. *See* Letter from the Federal Oversight and Management Board of Puerto Rico to Walter Higgins, Executive Director Puerto Rico Electric Power Authority, *Cobra Acquisitions LLC Power Restoration Contract – Observations, Feedback not Required* (May 24, 2018).

29. The Indictment's allegations that, in return for things of value, Tribble recommended that PREPA use Cobra to perform certain restoration work and helped Cobra get paid for some of its work are not relevant to Cobra's claims for administrative expenses.<sup>2</sup> The Indictment does not allege that Tribble's actions caused Cobra to receive any amounts to which it was not due under the Contracts. The Indictment's allegations are fully consistent with Cobra's contention that it fully and successfully performed all of the work that PREPA assigned to it, its work was to PREPA's tremendous benefit, and Cobra is entitled to be paid in full for that work.

**c. The DHS OIG Report Does Not Justify a Stay**

30. The Court should also reject the Movant's request to halt all progress on Cobra's administrative expense claims pending a FEMA review of its process for approving rates.

31. The Movants make much of the OIG Report that found fault with FEMA's December 2017 analysis of the rates used in the First Contract with Cobra. However, FEMA's December 2017 analysis concluded that the rates and costs PREPA agreed to pay to Cobra in the First Contract were reasonable. The OIG recommended, and FEMA agreed, that FEMA should review the analysis based on the OIG's findings and assess whether each of the costs for which PREPA has requested FEMA to pay are reasonable. FEMA has said it will complete that review by the end of May 2020.

32. The Movants ignore the fact that Cobra's Contracts are with PREPA and not with FEMA. FEMA's analysis, however it may come out, will not change PREPA's obligation to pay Cobra for the work it performed under its Contracts with PREPA in accordance with the rates and terms of the Contracts. *See* Art. 29 of the First Contract, Art. 53(F) of the Second Contract.

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<sup>2</sup> The Indictment alleges that Tribble sought to convince PREPA to assign Cobra repair work at the Monacillo substation and Roosevelt Roads. Those projects are not the subject of Cobra's current administrative expense claims.

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As the OIG recognizes, PREPA is responsible for showing the claimed costs are reasonable. *See* OIG Report at 3. Any adjustment that FEMA may make to the rates will be an issue between FEMA and PREPA and does not affect PREPA's obligation to pay Cobra.

33. In describing the OIG Report, the Movants fail to mention several key statements in that report that support Cobra's claims for payment from PREPA. In its December 23, 2017 letter to the Governor of Puerto Rico, which is Appendix B to the report, FEMA found that Cobra was "performing critical emergency repairs to transmission lines that are essential to the restoration of the overall system to transmit and distribute electric power throughout Puerto Rico." This description by FEMA undermines the Movants' bizarre statement that the work performed by Cobra may not have been "actual, necessary or beneficial" to PREPA. Urgent Motion at 4. It is self-evident that the work performed by Cobra was actual, necessary and beneficial to PREPA, the only power utility on the entire island of Puerto Rico. In fact, anyone enjoying power in Puerto Rico today knows the absurdity of the Movants' suggestion. Without Cobra's work, PREPA would lack its present cash flow and would be in no position to reorganize.

34. FEMA also recognized that as of the date of the December 23, 2017 letter, Cobra had billed PREPA \$174 million, under exigent circumstances, for which it had not been paid. *See* December 23, 2017 Letter. Before making payment, PREPA sought assurances from FEMA that the First Contract, including the costs and rates, was acceptable. FEMA confirmed that it had reviewed PREPA's First Contract with Cobra, including rates for services, and found that the First Contract was in compliance with FEMA requirements and also found the "costs under the this contract to be reasonable." December 23, 2017 Letter. FEMA came to this conclusion after comparing Cobra's rates to two other proposals received by PREPA. *See* OIG Report at 2.



35. Further, FEMA officials were not alone in finding the reasonableness of the rates and costs agreed upon between PREPA and Cobra. FEMA had requested that the Homeland Security Operational Analysis Center (“HSOAC”), which is operated by Rand Corporation on behalf of the Federal Government, “independently review the Cobra contract rates.” *See* OIG Report App. A. On March 28, 2019, Rand Corporation reported its findings to FEMA that “Cobra’s contract rates fall within a representative range that is reasonable for emergency work.” *Id.* The Rand report independently verifies the reasonableness of the pricing—agreed to by Cobra and PREPA.

36. Moreover, the Movants’ argument that PREPA may put off payment while FEMA re-evaluates rates under the First Contract, which FEMA approved prior to its execution, is a red herring. The largest payment remaining under the First Contract is for the reimbursement of taxes paid by Cobra to the government of Puerto Rico, which is for \$61,668,083.34. *See* Administrative Expense Motion at ¶ 61. There is no dispute that Cobra paid the taxes or that the First Contract requires PREPA to reimburse such payment. *See* Ex. B to the First Contract. This tax reimbursement claim is unrelated to rates and can be resolved now. In light of all this, Movants cannot rely on the OIG report as a basis for putting off all of PREPA’s obligations to pay.

37. In seeming recognition of this, Movants make a general claim that PREPA is in the process of conducting a review of Cobra’s work and invoices and they need more time to complete the review. Urgent Motion at 4. For more than six months, PREPA has maintained to Cobra that it is reviewing Cobra’s invoices but there has been no apparent indication that this review will come to a conclusion, which is the very reason Cobra filed its claim with this court. Much of Cobra’s claim includes amounts that are uncontested yet remain unpaid and the asserted

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ongoing review is clearly a smokescreen to delay making any payment, even uncontested amounts, for work completed. Cobra has a right under its Contracts with PREPA to be paid. Furthermore, the outstanding amounts owed to Cobra are accumulating monthly interest of 1%, or approximately \$2.5 million per month. *See* Administrative Expense Motion at ¶ 62.

38. Accordingly, neither the Indictment nor the OIG Report provide a basis for the stay Movants request.

### **III. The Requested Stay Would Greatly Prejudice Cobra and Delay This Case For No Reason, While Denying the Stay Would Not Prejudice Movants**

39. The Movants claim that they will suffer “immense” prejudice if Cobra’s claims are allowed to go forward without a stay and that Cobra will suffer no prejudice “at all” if its claims for more than \$216 million are stayed. Urgent Motion at 5 and 13. The Movants have it exactly backwards.

40. Cobra will be severely prejudiced by the stay the Movants seek. To begin with, there is no dispute that Cobra performed the services and is entitled to payment. While the Movants purport to be requesting a stay “only” until the January 29, 2020 omnibus hearing at this time, they are almost certainly going to seek to extend that stay. The current trial date in the criminal case is December 9, 2019, but that date was set before the initial status conference with all three defendants and it is very likely that the trial date will be continued well into 2020, if not later. Counsel for Cobra understands that voluminous document productions have begun in the criminal proceedings, and that the time necessary to review those documents, as well as other factors, will almost certainly preclude a December 2019 trial and likely result in a significant delay. Moreover, the Movants do not state that a stay will no longer be necessary upon completion of the criminal trial; they can be expected to contend that any stay should remain in

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effect during any appeals and any remands. In short, it is clear that the Movants intend the stay they are seeking to be in place for far longer than until the January 29, 2020 omnibus hearing.

41. A stay of any length will greatly prejudice Cobra. The sums owed to Cobra are in excess of \$250 million. Administrative Expense Motion at ¶ 15. While Movants calculate that Cobra's claims amount to "only" 17 percent of the overall price of the Contracts, this is misleading. The market capitalization of Cobra's parent company, Mammoth Energy Services, Inc., is currently less than \$100 million based on the closing price of its common stock on Nasdaq on October 14, 2019. Cobra is out of pocket most of its claimed amounts, having paid its laborers, suppliers, overhead and myriad others costs associated with rebuilding Puerto Rico's electrical grid on PREPA's behalf. Under the Contracts, Cobra is entitled to payment within 30 days of its invoices unless validly disputed by PREPA. Administrative Expense Motion at ¶¶ 25, 33. PREPA, however, has failed to pay as required under the Contracts, even on invoices to which it has raised no dispute at all. Only after six months of diligent but fruitless efforts to persuade PREPA to comply with its contractual obligation to pay Cobra for its work did Cobra bring its administrative expense claims to this Court. Requiring a company of Cobra's size to wait indefinitely to receive payments due and owing that are more than double the market capitalization of its parent company is unsustainable and unfair.

42. The Movants also incorrectly contend that Cobra is not prejudiced because it is not entitled to immediate payment on its claims. Setting aside the fact that Cobra was contractually entitled to payment long ago, the Movants' argument further fails because it misreads PROMESA section 314(b)(4) as authorizing it to defer payment on post-petition contracts until the effective date of a plan of arrangement. Rather than giving PREPA the option of paying a post-petition contract pursuant to the terms of such contract, or indefinitely deferring

such payment until a plan is confirmed, PROMESA section 314(b)(4) merely provides that a condition of confirmation of a plan includes all administrative claims must be paid in cash on the effective date of the plan. Nothing prohibits immediate payment of an allowed administrative expense, either, as the timing of payment is within a court's discretion. *See In re HQ Global Holdings, Inc.*, 282 B.R. 169, 173 (Bankr. D. Del. 2002); *In re Rare Coin Galleries, Inc.*, 72 B.R. 415, 417 (Bankr. D. Mass. 1987) ("In general, the timing of the payment of ordinary administrative claims is in the discretion of the Court."). Courts look to a variety of factors in determining whether to order immediate payment, including, but not limited to, prejudice to the debtor, hardship to the claimant, potential detriment to other creditors, and the length and expense of the case's administration. *See id.*; *see also In re Garden Ridge Corp.*, 323 B.R. 136, 143 (Bankr. D. Del. 2005).

43. Cobra will be prejudiced by any delay, much less an indefinite delay. It entered into the post-petition Contracts with PREPA with the expectation of being paid in the ordinary course of business as provided in the Contracts. Cobra incurred significant costs in rebuilding the electrical grid in Puerto Rico and getting the lights back on. Failing to pay such post-petition contracts pursuant to their terms will discourage companies from supporting a debtor during its reorganization case by doing business with it. Should another natural disaster strike Puerto Rico during the pendency of the PROMESA cases, PREPA may find itself unable to find a contractor willing to take the risk that PREPA has the option but not the requirement to pay for the goods and services as set forth in the contract. This is especially discriminatory and unfair at a time when PREPA is proposing to allow and pay administrative expenses representing interest on pre-petition bonds. *See Joint Motion of Puerto Rico Electric Power Authority and AAFAF Pursuant to Bankruptcy Code Sections 362, 502, 922, and 928, and Bankruptcy Rules 3012(A)(1) and*

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9019 for Order Approving Settlements Embodied in the Restructuring Support Agreement and Tolling Certain Limitations Periods [Case No. 17-BK-3283-LTS, ECF No. 1235].

44. The Movants, by contrast, will not be prejudiced by having to respond to Cobra's administrative claims now. Their arguments otherwise are primarily based on their incorrect assertions that resolution of the criminal charges against Tribble, Ellison and Patterson might somehow allow PREPA to keep the benefit of Cobra's work without paying for it. As demonstrated above, nothing in the Indictment suggests that PREPA was "fraudulently induced" into awarding the Contracts to Cobra or was the victim of any "deceit." Urgent Motion at 11, 12 n. 8. Nor does anything in the Indictment raise the possibility that PREPA will be excused from its contractual obligation to pay Cobra for its work. Similarly, the OIG Report does not create any possibility that PREPA will not have to pay Cobra.

#### **IV. The Court Should Hear Cobra's Undisputed Claims Immediately and the Disputed Claims After Any Necessary Discovery**

##### **a. Cobra's Undisputed Claims Should be Heard at the October 30, 2019 or December 11, 2019 Omnibus Hearings**

45. As set forth in Cobra's motion for allowance any payment of its administrative expense claims, PREPA has not disputed Cobra's entitlement to payment of significant sums that are due and owing under the Contracts. First, Cobra has submitted invoices totaling \$20,137,138.94 to which PREPA has not raised any objections. PREPA has acknowledged in discussions that payment is due for these invoices and, for several months preceding Cobra's motion in this Court, PREPA represented to Cobra that payment of these invoices was forthcoming, but no payment was made. Second, PREPA withheld \$7,551,956.01 in payments based on a prompt payment discount to which it was not entitled. Third, PREPA has also failed to pay Cobra \$61,668,083.34 due under the First Contract for reimbursement of Puerto Rico

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taxes in excess of 8.5% in 2018. PREPA has failed to provide any explanation for its failure to reimburse Cobra for these taxes as required.

46. These undisputed claims require no discovery and should be addressed immediately. Cobra requests that the Court hear these claims at either the October 30, 2019 or the December 11, 2019 omnibus hearings.

**b. After a Conference Addressing the Need for Any Discovery on the Disputed Claims, the Court Should Hear the Disputed Claims at the January 29, 2020 Omnibus Hearing**

47. The remainder of Cobra's claims, which seek payment on invoices that PREPA raised some objection to, may require some limited discovery. Cobra requests that the Court hear the parties' contentions regarding the need for discovery on those claims, and the scope and timing of any such discovery, at either the October 30, 2019 or the December 11, 2019 omnibus hearings. Cobra further requests that the Court order that any necessary be completed in time for the claims to be fully hears at the January 29, 2020 omnibus hearing.

RESPECTFULLY SUBMITTED.

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Dated: October 15, 2019

Respectfully submitted,

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